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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] Public Copy

FILE: [redacted] Office: Vermont Service Center Date: AUG 2 2001
EAC 98 150 53050

IN RE: Petitioner:
Beneficiary: [redacted]

APPLICATION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1154(a)(1)(A)(iii)

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted and the previous decision of the Associate Commissioner will be affirmed.

The petitioner is a native and citizen of St. Lucia who is seeking classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1154(a)(1)(A)(iii), as the battered spouse of a United States citizen.

The director denied the petition after determining that the petitioner failed to establish that he: (1) has resided in the United States with the citizen or lawful permanent resident spouse pursuant to 8 C.F.R. 204.2(c)(1)(i)(D); (2) is a person of good moral character pursuant 8 C.F.R. 204.2(c)(1)(i)(F); (3) is a person whose deportation (removal) would result in extreme hardship to himself, or his child, pursuant to 8 C.F.R. 204.2(c)(1)(i)(G); and (4) entered into the marriage to the citizen or lawful permanent resident in good faith pursuant to 8 C.F.R. 204.2(c)(1)(i)(H).

Upon review of the record of proceeding, the Associate Commissioner determined that the evidence furnished by the petitioner on appeal was sufficient to overcome the director's findings pursuant to 8 C.F.R. 204.2(c)(1)(i)(D) and (H). He noted, however, that the petitioner failed to submit any evidence of his good moral character, and that the evidence furnished was insufficient to establish that his removal from the United States would result in extreme hardship. The Associate Commissioner, therefore, concurred with the director's conclusion regarding 8 C.F.R. 204.2(c)(1)(i)(F) and (G), and denied the petition on July 20, 1999.

On motion, counsel asserts that 8 C.F.R. 204.2(c)(1)(i)(F)(vii) makes no requirement that the self-affidavit be accompanied by a local police certificate. He states that an affidavit from the previous petition was submitted and the good conduct certificate is forthcoming. Counsel further asserts that the petitioner has established that his removal would result in extreme hardship to himself and to his child. He states that the petitioner recently informed him that he became HIV-positive while having unprotected sexual relations with his United States citizen spouse, he is a program participant in the Uninsured Care Programs under the State of New York Department of Health, and that he is unable to receive this type of care in St. Lucia. Counsel submits additional documents.

PART I

8 C.F.R. 204.2(c)(1)(i)(F) requires the petitioner to establish that he is a person of good moral character. Despite counsel's

claim on appeal, pursuant to 8 C.F.R. 204.2(c)(2)(v), primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check for each locality or state in the United States in which the self-petitioner has resided for six or more months during the three-year period immediately preceding the filing of the petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self petition.

On motion, counsel submits a copy of a receipt from the New York Police Department for the processing of a good conduct certificate. While counsel states that the certificate is forthcoming, it has been approximately 23 months since the motion to reopen was filed and neither a police clearance nor a self-affidavit attesting to his good moral character has been entered into the record of proceeding.

The petitioner has failed to overcome the director's findings pursuant to 8 C.F.R. 204.2(c)(1)(i)(F).

PART II

At the time of the director's decision, 8 C.F.R. 204.2(c)(1)(i)(G) required the petitioner to establish that his removal would result in extreme hardship to himself or to his child. On October 28, 2000, the President approved enactment of the Violence Against Women Act, 2000, Pub. L. No. 106-386, Division B, 114 Stat. 1464, 1491 (2000). Section 1503(b) amends section 204(a)(1)(A)(iii) of the Act so that an alien self-petitioner claiming to qualify for immigration as the battered spouse or child of a citizen or resident alien is no longer required to show that the self-petitioner's removal would impose extreme hardship on the self-petitioner or the self-petitioner's child. Id. section 1503(c), 114 Stat. at 1520-21. Pub. L. 106-386 does not specify an effective date for the amendments made by section 1503. This lack of an effective date strongly suggests that the amendments entered into force on the date of enactment. Johnson v. United States, 529 U.S. 694, 702 (2000); Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991).

As a general rule, an administrative agency must decide a case according to the law as it exists on the date of the decision. Bradley v. Richmond School Board, 416 U.S. 696, 710-11 (1974); United States v. The Schooner Peggy, 1 Cranch 103, 110 (1801); Matter of Soriano, 21 I & N Dec. 516 (BIA 1996, AG 1997); Matter of Alarcon, 20 I & N Dec. 557 (BIA 1992). For immigrant visa petitions, however, the Board has held that, to establish a

priority date, the beneficiary must have been fully qualified for the visa classification on the date of filing. Matter of Atembe, 19 I & N Dec. 427 (BIA 1986); Matter of Drigo, 18 I & N Dec. 223 (BIA 1982); Matter of Bardouille, 18 I & N Dec. 114 (BIA 1981). Even if the law changes in a way that may benefit the beneficiary, the appeal must be denied, without prejudice to the filing of a new petition, to ensure that the beneficiary does not gain an advantage over the beneficiaries of other petitions. Id.

Atembe, Drigo, and Bardouille each involved petitions under the family-based preference categories in section 203(a) of the Act. In this case, however, the beneficiary seeks classification as the spouse of a citizen. INA section 204(a)(1)(A)(iii), 8 U.S.C. section 1154(a)(1)(A)(iii), as amended by Pub. L. No. 106-386, section 1503, supra. As immediate relatives, the spouses and children of citizens are not subject to the numerical limits on immigration, and do not need priority dates. INA section 201(b)(2)(A)(i), 8 U.S.C. section 1151(b)(2)(A)(i). The purpose of the Atembe, Drigo and Bardouille decisions would not be served by affirming the director's decision on this particular basis of the director's denial. For this reason, the director's objections have been overcome on this one issue (8 C.F.R. 204.2(c)(1)(i)(G)).

Accordingly, the decision of the Associate Commissioner dated July 20, 1999, will be affirmed as to 8 C.F.R. 204.2(c)(1)(i)(F).

It is noted for the record that the medical report, furnished on motion, reflects that the petitioner tested positive for HIV infection and that the results of the serological examination for HIV were confirmed by Western blot. The petitioner, therefore, appears inadmissible to the United States pursuant to section 212(a)(1)(A)(i) of the Act, 8 U.S.C. 1192(a)(1)(A)(i), as an alien who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome. HIV has been determined by the Public Health Service to be a communicable disease of public health significance. 42 C.F.R. 34.2(b)(4). The Service must address this issue in any future decisions or proceedings.

ORDER: The decision of the Associate Commissioner dated July 20, 1999, is affirmed.